Supreme Court, U.S.
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No. 99-1549

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada corporation;
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Communications Act require AT&T to provide 900 telephone call data to MRO because it is "...in connection with" AT&T's "communications services" (i.e., AT&T's tariffed 900 transport services)?

2. Does the FCA require AT&T to provide as part of its tariffed 900 services the telephone call data that is necessary in order to bill for such calls?

PARTIES TO THE PROCEEDING

Petitioner

The parent company of Petitioner MRO Communications, Inc. ("MRO") is Bellatrix International, Inc. a corporation which has shares issued to the public.

Respondent

The respondent is AT&T Corporation.

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REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE FCC'S DECISION IN AT&T DIAL-IT, 4 FCC RCD. NO 9, 3429 (1989), AND CONFLICTS WITH THE FEDERAL COMMUNICATIONS ACT ("FCA"), §§ 201-202, WHICH REQUIRES AT&T TO PROVIDE THE 900 TELEPHONE CALL DATA TO MRO BECAUSE IT IS "...IN CONNECTION WITH" AT&T'S "COMMUNICATIONS SERVICES" (I.E., AT&T'S TARIFFED 900 TRANSPORT SERVICES).

The Ninth Circuit's decision is contrary to the decision in In re AT&T Dial-It, 4 FCC Rcd. No. 9, 3429 (1989) at 3432 where the FCC stated:

> "A third party wishing to provide billing and collection services would require the LECs' name and address data bases to match calls to callers. AT&T notes that the Commission has required LECs to make call detail information available 'on a reasonable basis'."[1] (Emphasis

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[1]AT&T does not deny the accuracy of this quote from the Dial-It case, but instead asserts (Br. 6, n. 2) that " ... in the very next line of the FCC's Dial-It decision after the line quoted by MRO (Pet. At 3), the FCC stated that "AT&T argues that the fact of competition for billing of IXC services in general indicates the presence of market forces sufficient to respond to excessive rates or practices by 900 billing and collection providers." Dial-It, 4 F.C.C.R. at 3432. For that reason, the FCC did not find a need for regulation of billing services provided by carriers like AT&T."

First, the "next line of the FCC's Dial-It decision" referred to by AT&T does not in any way change the meaning of Petitioner's quotation from the Dial-It decision.

Second, as stated later in this section, the FCC's Dial-It holding, that AT&T's billing and collection services in that case, were not subject to tariff, was based on the factual foundation that AT&T's 900 billing services in that case were not tied to AT&T's

added.)

The Ninth Circuit's Memorandum entire discussion on this point is (Pet. at 9a):

> "MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions[2] or the statute [FCA] to which MRO pointed."

In this connection, AT&T doesn't deny that the Ninth Circuit overlooked the material point of fact that such call data is essential in order for MRO to be able to bill callers to MRO's 900 telephone numbers. An information provider ("IP") while purchasing 900 transport services from AT&T, cannot conduct its own billing, or arrange for billing services from a company other than AT&T, unless AT&T furnishes to the IP, or to the billing company, the calling telephone number, the date of the call, and the length of the call ("call data") (Pet.

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900 tariffed services for the same 900 telephone numbers, as they are in AT&T's 900 BSA in this case.

[2]In fact, the plain language of Section 5.4.4. of AT&T's Tariff No. 1 does provide for call records (i.e., "information forwarding") as part of AT&T's tariffed 900 transport services.

However, AT&T asserts (Br. 8):

"MRO relies on Section 5.4.4. of the tariff, which it neglects to inform the Court, it did not raise in the district court. Indeed, MRO brought that Tariff provision to the Ninth Circuit's attention only in a letter submission after the parties had completed all briefing in the Ninth Circuit and the record had been filed."

First, MRO did argue in the District Court that there was no competent evidence to support AT&T's assertion that the relevant portion of AT&T's Tariff was Section 5.4.3.

Second, contrary to AT&T's assertion (Br. 8), MRO through its agent, ITA, did elect, and pay for its tariffed "information forwarding" services pursuant to Section 5.4.4.

Third, contrary to AT&T's assertion (Br. 8-9), Tariff Section 5.4.4. information does provide for the frequency of calls because such information is provided on a "call by call basis".

Fourth, Tariff Section 5.4.4. clearly demonstrates that AT&T's call data is part of AT&T's tariffed transport services!

at 63a).

The call data must be part of AT&T's 900 tariffed services if the IP is to be able to bill its 900 calls. AT&T does not deny that if it is a matter of contract, then AT&T can refuse to contract with the IP, and the IP will be unable to bill its 900 calls. For such reasons, pursuant the FCA this call data is supposed to be provided by AT&T to MRO as part of AT&T's 900 tariffed transport services, because it is a "practice and/or regulation affecting such practice" which was required to be tariffed pursuant to the FCA §203(a) and §§201-202 because they are "for, or in connection with" AT&T's "communications services" (i.e., AT&T's 900 transport services).[3]

AT&T does not deny that its call data is the identical information that AT&T obtains while furnishing 900 tariffed transport services to MRO; which AT&T utilizes to determine MRO's 900 transport services charges (Pet. at 63a).

However, the district court stated (Pet. at 39a):

> "Moreover, the FCC has ruled that billing and collection services, which include the provision of call records, are controlled not by tariffs, but by outside contracts. AT&T Dial-It 900 Servs., 4 F.C.C.D. 3429, 3433-34"

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[3]AT&T asserts (Br. 7) that: "MRO also argues that if billing services remained unregulated, then AT&T could "refuse to contract" with its customers to provide them with the call detail necessary to bill customers. (Pet. at 5.) That is a possibility - however unlikely- that is controlled by the market."

AT&T is wrong. That possibility is not controlled by the market, but rather by the FCA. The reason is that if AT&T refuses to contract with the IP, the IP will be unable to bill its 900 calls. Therefore, pursuant the FCA this call data is supposed to be provided by AT&T to MRO as part of AT&T's 900 tariffed transport services, because it is a "practice and/or regulation affecting such practice" which was required to be tariffed pursuant to the FCA §§201-202, 203(a) because they are "for, or in connection with" AT&T's "communications services" (i.e., AT&T's 900 transport services).

AT&T doesn't deny that in reaching this conclusion, the district court completely ignored MRO's Opposition (Pet. at 61a-63a); which explained (i) the standard under Dial-It for determining whether call data are part of tariffed transport services, and (ii) the facts why MRO's 900 services from AT&T result in AT&T's call data being part of AT&T's tariffed transport services to MRO under that standard. None of those MRO undisputed facts (Pet. at 61a-62a) were mentioned by the district court in its one sentence conclusion.

AT&T's Opposition does not deny that the Ninth Circuit's Memorandum did not address MRO's specific contentions[4] that (1) AT&T's 900 call data is essential in order for MRO to be able to bill for its 900 calls, (2) according to the FCC's own standard in In re Dial-It Servs. and Third Party Billing and Collection Servs., 4 F.C.C.R. 3429 (1989), AT&T's call data is part of AT&T's tariffed transport services, (3) that the FCC's Dial-It standard (for determining whether a service is part of tariffed services) was accurately quoted by MRO[5] in its Petition (Pet. 6), and (4) as stated in MRO's Petition (Pet. 6-8), it is undisputed that under that FCC standard, AT&T's call detail is part of AT&T's transport services.[6]

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[4]Instead, AT&T makes the general inapplicable assertion (Br. 5) that, in fact, "Contrary to MRO's assertion (Pet. at 5-6), the Ninth Circuit did, in fact, consider MRO's arguments. Indeed, the Ninth Circuit specified that it had considered the matters raised in MRO's briefs, and that it had reviewed the Tariff and statutory provisions upon which MRO relies. (See Pet. App. at 8a-9a.)"

[5]AT&T asserts (Br. 6, n. 3) that "MRO also inappropriately relies on the FCC's decision of AT&T's "Call Count" feature in the Dial-It decision (Pet. at 6-7)." AT&T is wrong because the FCC in analyzing AT&T's Call Count feature applied the FCC's Dial-It standard for determining whether a service (such as the Call Count feature) is part of tariffed services.

[6]AT&T asserts (Br. 7)that "MRO does not complain that AT&T failed to provide it with call detail sufficient under the Tariff for transport services".

First, AT&T erroneously states that it supplied MRO (rather

AT&T doesn't deny that (1) none of the undisputed differentiating facts (presented by MRO in its Opposition to AT&T's Motion for Summary Judgment, Pet. at 61a-62a) between Dial-It and this Case were even mentioned by the district court in its one sentence conclusion that Dial-It is controlling (Pet. at 39a) and (2) Dial-It, was not a case, such as here, where the IP had to have the call data in order to be able to bill its 900 calls.

AT&T does not deny that the Ninth Circuit's Memorandum did not address these specific issues. Instead, AT&T asserts (Br. 5-6) that the FCC's decisions in Dial-It supra, In re Audio Communications, 8 F.C.C.R. 8697 (1993), and In re Paul Ondulich 5 F.C.C.R. 3190 (1990) permit AT&T's 900 billing and collection services to be untariffed.

However, the FCC's Dial-It holding, that AT&T's billing and collection services in that case, were not subject to tariff, was based on the factual foundation that AT&T's 900 billing services in that case were not tied to AT&T's 900 tariffed services for the same 900 telephone numbers, as they are in this case. Specifically, in this case, once AT&T ceases billing and collection services for an IP's particular 900 number, AT&T refuses to thereafter provide transport services to the IP for that same 900 number.[7]

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than AT&T itself) with call detail for transport services.

Second, MRO repeatedly complains hereinabove that in this case the call detail is part of AT&T's tariffed transport services required to be supplied to MRO (or its agent ITA) pursuant to (1) AT&T's Tariff Section 5.4.4., (2) the FCC's Dial-It standard for determining what services must be tariffed, and (3) the FCA.

[7]Because of AT&T's "tying" provisions, AT&T's 900 BSA IP's must use AT&T's transport services; then if the BSA is terminated by either party, for any reason whatsoever, the IP loses its unique 900 numbers. Once an IP uses AT&T's 900 billing services, the IP must continue to use AT&T 900 transport services or lose its unique 900 numbers; in which the IP typically will have invested substantial advertising sums. The effects of these provisions in the AT&T's BSA are to "tie" AT&T's billing services to AT&T transport services for the same 900 number, and to prevent AT&T's

In Dial-It, supra, the FCC stated in par. 25 at 3432:

> "AT&T asserts that sponsor or subscribers are not required to take Premium Billing as a concomitant to tariffed Dial-It 900 services and indeed, tariffed service subscribers are not 'entitled' to receive Premium Billing service. Instead, they are separate services."

Likewise, the FCC's Audio Communications decision referred to by AT&T (Br. 6) was also based on the fact that when Sprint ceased providing billing services for a particular 900 number, they continued to provide transport services for that 900 number. Or as the FCC stated in par. 6 of its decision:

> "Sprint Telemedia continues to offer 900 transmission service on acommon carrier basis, but without billing and collection for all interested IP's." (Emphasis added.)

Thus, Sprint did not "tie" its 900 billing services to its 900 transport services for a particular 900 number, as does AT&T. In this Case (Unlike the Dial-It and Audio communications cases[8]), AT&T's 900 billing services are inextricably "tied" to AT&T's 900 transport services for the

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IP's from utilizing billing services of AT&T's competitors.

[8]In re Paul Ondulich v. AT&T Communications, Inc., 5 F.C.C. Rcd. No. 11 (1990) cited by AT&T (Br. 6) is also distinguishable because there was no tie in that case between tariffed transport services and nontariffed billing services; since the 900 service there was a nontariffed Call Count service, not a tariffed communication service. Indeed, the F.C.C.'s decision in Dial-It expressly distinguishes Call Count service from the information services in the case at bar. "A Call Count service sponsor / subscriber does not seek a transmission path from AT&T in order to provide, e.g., an information service to his customers. Rather, the Call Count sponsor / subscriber obtains that service only in order to obtain substantive information from AT&T, for example, how many callers have voted 'yes' or 'no' ". 4 F.C.C. Rcd. No. 9 at 3431.

same 900 numbers.[9] The FCC's strong opposition to any such tying practices has been stated in In the Matter of Competition in the Interstate Interexchange Marketplace, FCC Docket No. 90-132 (1992) as follows:

> "We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using 'old' 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under §§ 201(b) of the Communications Act." FCC Rcd. No. 9, p. 2677.
>
> The Commission's rationale was that:
>
> "Because of concerns that bundling of 800 services by AT&T could lead to anticompetitive leveraging, thereby harming competition for other services, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable." 7 FCC Rcd. No. 9, p. 2678.
>
> More specifically, the Commission concluded:
>
> "We have found that leveraging is a significant risk with respect to'captive' 800 service customers - customers that are unable to change their800 number without incurring substantial costs." 7 FCC Rcd. No. 9, p. 2680.

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[9]AT&T asserts (Br. 7) that the "... reason that (the FCC has refused to assume any regulatory authority over the billing services [is] because there was and is available competition..." In fact, the critical reason that the FCC relied on in AT&T's cited cases was that there was no "tie" in those cases between the nontariffed billing services and the tariffed transport services; as there is in this case.

II. BY HOLDING THAT MRO CANNOT RECOVER ITS DAMAGES UNDER THE FCA FOR AT&T'S REFUSAL TO PROVIDE THE 900 CALL DATA NEEDED TO BILL ITS CALLERS, THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN MAISLIN INDUSTRIES V. PRIMARY STEEL, 497 U.S. 116 (1990), AND ALSO CONFLICTS WITH §§ 201-202, 206-207 OF THE FCA.

AT&T doesn't deny that under Maislin's "filed tariff" doctrine and §§206-207 of the FCA a customer can sue a carrier if the customer (e.g., MRO) overpaid, the tariff is unreasonable, or the tariff (or its application) is discriminatory.

In its First Counterclaim against AT&T, MRO is suing AT&T to "recover reparation[s]"in the words of Maislin, or damages for AT&T's violations of their Tariff and/or the FCA, as MRO is entitled to do under 47 U.S.C. §§ 206-207.

For the above reasons, AT&T's failure to provide MRO's 900 call detail violates (1) § 5.4.4. of AT&T's Tariff and (2) the unjust, unreasonable and discrimination provisions of the FCA (§§201-202)especially because AT&T, by not providing 900 call detail records for MRO, had selectively discriminated against MRO, compared to other 900 transport services customers (Pet at 63a).

III. THE NINTH CIRCUIT'S RULINGS WOULD ENABLE AT&T (THE NATION'S LARGEST COMMUNICATIONS COMMON CARRIER) BY NOT TARIFFING CERTAIN SERVICES (WHICH ARE "CONNECTED" TO AT&T'S TARIFFED "COMMUNICATIONS" SERVICES") TO PREVENT AT&T'S TARIFFED COMMUNICATIONS SERVICES CUSTOMERS FROM UTILIZING SUCH TARIFFED SERVICES, UNLESS THEY AGREED TO AT&T'S CONTRACT TERMS.

Under the Ninth Circuit's holding, if call data such as the calling telephone number, and date and length of call, were matters of mere contract between AT&T and the IP, as opposed to being a required tariffed service under the FCA, then AT&T could prevent any IP from being able to bill its 900 calls received through AT&T's tariffed 900 transport services by simply not agreeing to contract terms. This would give AT&T an even greater "monopoly leveraging" position (in violation of §§201-202 of the FCA) than in In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, (1992) FCC Rcd. No. 9, p. 2677.[10]

IV. THE NINTH CIRCUIT'S DECISION ALSO SUBSTANTIALLY AFFECTS A RULE OF NATIONAL IMPORTANCE; NAMELY, WHAT SERVICES ARE "...FOR OR IN CONNECTION WITH . . . COMMUNICATIONS SERVICES..." PURSUANT TO THE FCA, IN WHICH THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY.

The Ninth Circuit's decision substantially affects a rule of national importance; namely, what services are "...for, or in connection with.. communications services..." pursuant to the

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[10]AT&T asserts (Br. 9) that "MRO next contends that the Ninth Circuit improperly held that billing services (including the provisions of call detail records) by interexchange carriers like AT&T are not regulated, because the absence of Federal regulation would permit AT&T to simply refuse to provide billing services to certain customers, purportedly giving AT&T "monopoly leveraging position in violation of Sections 201 and 202 of the ...[FCA]. (Pet. at 10-11.) That contention is baseless. The FCC specifically found that there was a highly competitive market for billing services, and therefore there was no reason to subject billing services to the ...[FCA]. Once again, AT&T is wrong because in this case AT&T "tied" its tariffed transport services and its nontariffed billing services. As stated in Section 1. of this Brief, in the FCC's decisions referred to by AT&T there was no "tie" in those cases between the tariffed transport services and the nontariffed billing services; as there is in this case."

FCA[11], in which there is an overriding need for national uniformity.[12]

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

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[11]It is a basic tenet of statutory construction that in interpreting the meaning of the words of a statute, the purpose of the statute is of critical importance (i.e., what "evils" is the statute directed to). The purpose of § 201(b) of the FCA is to protect subscribers from the unrestricted power of a common carrier, by requiring the common carrier's services to be provided to all subscribers on a "just and reasonable" basis. Therefore, the words "for, or in connection with such communications services" in Section 201(b) of the Communications Act, should be interpreted to include AT&T's 900 billing services, which are "tied" to AT&T's tariffed transport services for the same 900 numbers.

[12]AT&T asserts (Br. 10) that "MRO nowhere explains why this issue, which the FCC has determined should be subject to the variety of the marketplace, requires uniformity. Nor does it explain how there is any split or conflicting authority on whether billing services (including call detail) should be subject to the [FCA]...."

First, the FCC has not, and pursuant to the FCA cannot, determine that nontariffed billing services which are "tied" to tariffed transport services "should be subject to the variety of the marketplace". The FCA has determined that if the nontariffed services are "...for, or in connection with.. communications services...", they must be tariffed.

Second, the Ninth Circuit in this case determined this issue contrary to the FCC decisions referred to by AT&T because in those decisions the FCC required that there be no "tie" between tariffed transport services and nontariffed billing services.

Third, the plain language of the FCA is contrary to the Ninth Circuit's decision; especially since AT&T's tariffed services in this case are "tied" to AT&T's nontariffed services.

Fourth, AT&T asserts (Br. 10, n.6) that the cases cited in the Petition (Pet. 11) do not support MRO's argument. In fact those cases do support MRO's argument because they all involved the question of what services are "...for, or in connection with.. communications services..." pursuant to the FCA; in which there is an overriding need for national uniformity.